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Ulin ak Blukok v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-OS(M)-280–07 OF 2019
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND LEE HENG CHEONG JJCA
20 DECEMBER 2021

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged for murder — Appellant convicted and sentenced to death under s 302 of the Penal Code — Whether High Court judge failed to consider issue of insanity under s 84 of the Penal Code

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The appellant was convicted and sentenced to death under s 302 of the Penal Code by the High Court for causing the death of three family members. On the day of the incident, PW13 was making a fish trap in the living room of the house. The appellant who was known to his family entered the house with a parang and slashed him. His son-in-law, Muhamad Joe ak Gindi came to his aid and got struck with the parang. PW13 took the opportunity to escape. PW12 who was the wife of PW13 witnessed the brutal attack. PW11 who was the son of PW12 and PW13 saw the attack and got out of the house. It was then that he saw the appellant slashing his grandmother, Noraini bt Abdullah outside her house. Then he saw the appellant entering the living room and burning the sofa cushion. His bedridden grandfather, Daud bin Abdullah was inside the house at that time. The investigating officer found three burnt bodies at the crime scene. The appellant was arrested on the day of the incident. At the end of the prosecution's case, the learned trial judge was satisfied that the prosecution had established a prima facie case against the appellant. He was called to enter his defence. After the close of the defence case, the trial judge found not only the appellant had failed to prove the defence of insanity but he also failed to create a reasonable doubt to the prosecution's case. Accordingly, the appellant was convicted and sentenced to death. Hence, this appeal.

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Held, dismissing the appeal:

(1) The learned trial judge had applied the correct test of legal insanity as opposed to medical insanity. The learned trial judge had adopted the correct approach in resolving the issue of insanity. Based on the appellant's own admission, it was clear that he was aware that he killed people and he knew what he was doing was wrong in law. Therefore, he could not claim he was insane at the time of the commission of the offence in the sense required under s 84 of the Penal Code. The

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psychiatrist (DW2), in his expert report and oral testimony formed a conclusion that the appellant was aware of the nature of his acts that what he was doing was wrong and punishable by law. In the absence of any evidence to the contrary by the appellant's expert witness, there was no appealable error and the learned High Court judge had not erred in fact and in law in convicting and sentencing the appellant. The conviction was safe and there was no merit in the appeal (see paras 29–31 & 34).

[Bahasa Malaysia summary

Perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati di bawah s 302 Kanun Keseksaan oleh Mahkamah Tinggi kerana menyebabkan kematian tiga ahli keluarga. Pada hari kejadian, PW13 sedang membuat perangkap ikan di ruang tamu rumah. Perayu yang dikenali keluarganya masuk ke dalam rumah dengan sebilah parang dan menetaknya. Menantunya, Muhamad Joe ak Gindi datang menolongnya dan terkena parang. PW13 mengambil kesempatan untuk melarikan diri. PW12 yang merupakan isteri kepada PW13 menyaksikan serangan dahsyat itu. PW11 yang merupakan anak lelaki PW12 dan PW13 melihat serangan itu lalu keluar dari rumah. Ketika itulah dia melihat perayu menetak neneknya, Noraini bt Abdullah di luar rumahnya. Kemudian dia melihat perayu memasuki ruang tamu dan membakar kusyen sofa. Datuknya, Daud bin Abdullah, yang sakit terlantar, berada di dalam rumah ketika itu. Pegawai penyiasat menemui tiga mayat hangus di tempat kejadian. Perayu telah ditahan pada hari kejadian. Pada akhir kes pendakwaan, hakim bicara yang bijaksana berpuas hati bahawa pihak pendakwaan telah menubuhkan kes prima facie terhadap perayu. Dia dipanggil untuk membela diri. Selepas penutupan kes pembelaan, hakim bicara mendapati bukan sahaja perayu gagal membuktikan pembelaan tidak waras tetapi dia juga gagal menimbulkan keraguan munasabah kepada kes pendakwaan. Sehubungan itu, perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) Hakim bicara yang bijaksana telah menggunakan ujian tidak waras dari segi undang-undang yang betul berbanding tidak waras dari segi perubatan. Hakim bicara yang arif telah menggunakan pendekatan yang betul dalam menyelesaikan isu gila. Berdasarkan pengakuan perayu sendiri, adalah jelas bahawa dia sedar bahawa dia membunuh orang dan dia tahu apa yang dia lakukan adalah salah di sisi undang-undang. Oleh itu, dia tidak boleh mendakwa dia tidak waras semasa melakukan kesalahan itu dalam erti kata yang dikehendaki di bawah s 84 Kanun Keseksaan. Pakar psikiatri (DW2), dalam laporan pakar dan keterangan lisannya membuat kesimpulan bahawa perayu menyedari sifat perbuatannya bahawa apa yang dilakukannya adalah salah dan boleh dihukum oleh undang-undang. Sekiranya tiada sebarang keterangan

yang bertentangan oleh saksi pakar perayu, tiada kekhilafan rayuan dan hakim Mahkamah Tinggi yang bijaksana tidak terkhilaf dalam fakta dan undang-undang dalam mensabitkan dan menjatuhkan hukuman kepada perayu. Sabitan tersebut selamat dan tiada merit dalam rayuan (lihat perenggan 29–31 & 34).]

Cases referred to

John a/k Nyumbei v PP [2007] 7 MLJ 206, CA (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, CA (refd)

Legislation referred to

Penal Code ss 84, 302
Criminal Procedure Code s 277

Appeal from: Criminal Case No KCH-45B-1/7 of 2017 (High Court, Kuching)

Benard Philip Lanat (BP Lanat & Co) for the appellant.
Ku Hayati bt Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hadhariah Syed Ismail JCA:

INTRODUCTION

[1] The appellant was convicted and sentenced to death under s 302 of the Penal Code by the High Court of Sabah and Sarawak at Kuching on 19 June 2019 for causing the death of three family members on 22 January 2017. His appeal against the conviction and sentence was heard and dismissed by this court on 26 October 2021. Our reasons for the decision is as follows.

THE CHARGES

[2] The appellant was charged with three charges as follows:

First charge

That you, on January,22 2017 between 3.00 pm and 3.30pm, at Rumah Kampung Tumuk, Batu 8 Jalan Matang, in the District of Kuching, in the State of Sarawak, did commit murder of one Muhamad Joe ak Gindi (NRIC: 931125–13–6901), and that you thereby had committed an offence punishable under Section 302 of the Penal Code.

Second charge

That you, on January,22 2017 between 3.00 pm and 3.30pm, at Rumah Kampung Tumuk, Batu 8 Jalan Matang, in the District of Kuching, in the State of Sarawak, did commit murder of one Daud bin Abdullah (NRIC: 470612–13–5819) and

that you thereby had committed an offence punishable under Section 302 of the Penal Code.

Third charge

That you, on January,22 2017 between 3.00 pm and 3.30pm, at Rumah Kampung Tumuk, Batu 8 Jalan Matang, in the District of Kuching, in the State of Sarawak, did commit murder of one Noraini binti Abdullah, and that you thereby had committed an offence punishable under Section 302 of the Penal Code.

THE FACTS OF THE PROSECUTION'S CASE

[3] From the judgment of the learned trial judge, the facts can be briefly stated as follows.

[4] The victims in the three charges are an elderly couple and their grandson-in-law. The elderly couple are Daud bin Abdullah and Noraini bt Abdullah. They lived in Kampung Tumuk, Batu 8, Jalan Matang. Their son and daughter in law (PW13 and PW12) lived in an adjoining house. The victim in the first charge is the grandson-in-law of the deceased elderly couple and he too lived in the adjoining house.

[5] PW13 told the court that on the day of the incident, he was making a fish trap in the living room of the house. The appellant who is known to his family entered the house with a parang and swung it at him. PW13 attempted to avoid it but he was slashed at the elbow. The appellant then attempted to slash the top of his head. His son-in-law, Muhamad Joe ak Gindi came to his aid but the parang hit his neck instead. The appellant then struck Muhamad Joe ak Gindi twice above the waist with the parang. PW13 took the opportunity to escape to his parent's house next door. He ran towards the kitchen and then ran past the bushes behind the house to seek help. He was seriously injured and was hospitalized for two months.

[6] PW12 who is the wife of PW13 witnessed the brutal attack on her husband and her son-in-law. When the appellant went out of the house to pursue her husband, she brought her daughter who is the wife of Muhamad Joe ak Gindi (PW10) and two children to the kitchen to escape through the back door.

[7] PW11, who is the elder son of PW12 and PW13 saw the appellant attacking his father and brother-in-law with a parang, quickly pushed his sister inside a room and locked it from inside. He then jumped out of the window and got out of the house. It was then that he saw the appellant slashing his grandmother (Noraini bt Abdullah) who was at the top of the staircase outside her house. His grandmother collapsed after she was struck with the parang. He saw the appellant slashing his grandmother twice. He said the appellant then

went to the kitchen of his grandparent's house. He heard him switching on the stove. Then he saw the appellant entering the living room and burning the sofa cushion. He said his bedridden grandfather was inside the house at that time.

[8] PW10 who is the sister of PW11 gave similar evidence. Her husband is the deceased Muhamad Joe ak Gindi. She said that on the day and time in question, she was in the house with her family members. Her mother shouted that somebody had entered the house with a parang. Then, her brother (PW11) pushed her into a room and locked the door. However, from the window she saw the appellant slashing her grandmother with a parang. After that, her mother (PW12) opened the kitchen door to let her escape from the house. As she ran with her mother, her younger brother and daughter to the kitchen door, she saw her husband lying on the floor in the living room. He was not breathing that time and was bleeding profusely. While taking refuge at a neighbour's house, she heard the sound of a gas explosion. The house was ablazed after that.

[9] The investigating officer of the case (PW14) said that his team found three burnt bodies at the crime scene. He said the bodies are that of the victims in the three charges as they were positively identified by family members. The bodies were recovered from the two houses that were gutted by fire.

[10] Dr Norliza bt Ibrahim (PW3) who is a government pathologist performed the post mortem examination on all the three victims. In respect of the victim in the first charge (Muhamad Joe ak Gindi), she found that the body was so charred that she could not ascertain the cause of death. However, she opined that the victim died before the fire started. This is because she did not find any soot in the larynx, trachea and major airways of the victim. The body of the victim in the second charge was also charred by the fire. She could not determine the cause of death. She could not detect soot in the major airways of the deceased. Therefore, she opined that the victim died before the fire started. In respect of the victim in the third charge, PW3 said that the body was also charred but she found an irregular slash wound on her back. The wound cut the underlying muscle up to the right scapula and the T2 vertebrae body (chest back bone). She also did not detect soot in the major airways of the victim. She concluded that the cause of death was blood exsanguination due to sharp force trauma.

[11] PW5 who is a qualified fire investigator from the fire department examined the cause of the fire at the two houses in question. He opined that the fire started in the living room of the elderly victims. He said that the source of ignition was a lighter and based on the evidence of PW11, he concluded that the act of burning the furniture cushion in the living room started the fire.

[12] The appellant was arrested by Insp Mhd Rafi bin Mohamad Jaraee (PW4) on the day of the incident at about 6.50pm. He was in his hut which is situated in the jungle area near Jalan FAC Matang, Padawan. At the time of his arrest, he held a parang in his hand. The parang was sent for DNA analysis. Rina bt Mohd Nawi (PW8) who is a scientific officer from the chemistry department carried out DNA analysis. The DNA profile developed from the stains found on the parang matched the DNA profile of the victim in the third charge.

[13] At the end of the prosecution's case, after conducting a maximum evaluation of the evidence, the learned trial judge was satisfied that the prosecution had established a prima facie case against the appellant for all three charges. The prima facie case was premised on the testimonies of the three eye witnesses (PW11, PW12 and PW13) who saw the appellant slashed the victims with a parang and also the testimony of PW11 who saw the appellant started a fire in the house. Such acts lead to an irresistible inference that the appellant would have known that his acts would in all probability cause their death. Thus, he was called to enter his defence.

THE DEFENCE'S CASE

[14] The appellant gave evidence on oath. Beside his own evidence, he also called a government psychiatrist (DW2) to support his evidence.

[15] In his sworn evidence, the appellant did not deny killing the victims and setting the two houses on fire. However, he spoke of his encounters and conversation with shadows. At first, he said that he was acquainted with Hassan bin Daud (PW13). He said that he had a good relationship with PW13. He sat down with PW13 on several occasions to drink alcohol. But, Noraini bt Abdullah (PW13's mother) did not like him. Later, he said that PW13 and others he was acquainted with in the village were not real people but were actually shadows. He said the shadow of Hassan asked him to leave his house or else he will be killed. He then said that the shadows in his dreams did all sort of things. Later, he said that it was not a dream but that the people looked like shadows to him.

[16] He also said that his mother who had died when he was six years old asked him to come home if nobody liked him. In respect of the day in question, he said he wandered in front of the victims' houses. He recalled that PW13's mother told him that if he still wanted to drink alcohol with PW13, it is better for him (the accused) to kill all the family members. She said the same thing on the day in question. It was the third time that she had said that. This is the reason he launched the attack on the family with a parang and set their houses on fire.

[17] Dr Chhoa Keng Hoe (DW2) is a qualified government psychiatrist attached to Hospital Sentosa in Kuching. His expertise was not challenged by the prosecution. He treated the appellant when he was under observation at the hospital for three months. His psychiatric report was tendered and marked as D2. He said when he examined the appellant, he found that he was aware of the nature of his act and that he knew what he was doing was wrong. At first, to a question by counsel for the appellant, he agreed that the finding was not in relation to the time of incident. The exchange between DW2 and counsel for the appellant is as follows:

> Q: Therefore, he was aware of the nature of his act that what he was doing was wrong and punishable under the law in the course of your observation. Is that so?
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> A: Yes
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> Q: And not during when the incident happened?
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> A: Yes.

[18] When cross-examined by the learned DPP, DW2 corrected himself and said that his finding on the mental condition of the appellant refers to the time of the index offence as well. He said the finding was based on the history provided by the appellant pertaining to the time of the offence, evidence provided by the police as well as the series of psychological assessment that he conducted. This can be seen in his answer to the following question during cross-examination by the DPP:

> Q: Can you explain your answer?
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> A: Basically, during our forensic assessment for an accused who has been sent to us what we always do was to collect all the collaborative information as evidence for the index offence as well as performing a serial mental and psychological assessment on the accused pertaining to the index offence. Despite the assessment is done retrospectively we are able to delineate a proper chronological sequence of the index offence. From thereon coupled with the cross-sectional mental assessment with the accused for a period of three months thus we come up with the conclusion.

[19] To a question by the court, DW2 said that the appellant was of sound mind at the time of the commission of the offence.

[20] After the close of the defence case, the trial judge found not only the appellant had failed to prove the defence of insanity but he also failed to create a reasonable doubt to the prosecution's case. Accordingly, the trial judge ruled that the prosecution has proved its case beyond reasonable doubt and convicted the appellant on all three charges. The only sentence provided for murder is death. Therefore, the appellant was sentenced to death by being hanged by the neck until he is dead in accordance with s 277 of the Criminal Procedure Code.

A THE ISSUES

[21] The only issue raised by the appellant in this appeal is he was insane at the time of the commission of the offence. But the High Court judge had failed to consider the issue of insanity under s 84 of the Penal Code which reads as follows:

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> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

C THE APPELLANT'S SUBMISSION

[22] Learned counsel for the appellant submited that the trial judge had failed to consider the following relevant matters which might cause the court to

D come to a different conclusion:

(a) having held that DW2 had given evidence of medical insanity that afflicted the appellant, the trial judge had failed to consider whether the appellant's medical insanity as being delusional disorder could have

E significant effect on what the appellant knew at the time of doing it, the nature of his act or that what he was doing is either wrong or contrary to law;

(b) the issue of legal insanity under s 84 of the Penal Code is to be decided by the court and not by medical witness. In this case, the trial judge rely

F on the evidence of DW2; and

(c) the trial judge had failed to consider the cumulative effect of all facts which could lead to a possible conclusion that at the time of the alleged offences the appellant was under unsoundness of mind and did not

G know what he was doing and did not know that what he was doing was wrong or contrary to law given the fact:

(i) that there were no evidence adduced by the prosecution that the appellant had planned the attacks;

H (ii) that the attacks were continuous acts until he completed burning of the houses;

(iii) that the appellant fled the scene not to escape but to return to his own hut and he did nothing to hide the weapon used during the

I attacks; and

(iv) that after the attacks, the appellant did not hide but returned to his hut in the jungle and there was no evidence that the appellant had resisted his arrest.

[23] For the abovesaid reasons, it is submitted that the appellant's conduct at the time of committing the offences and after the commission of the offences were consistent with conduct of someone who was mentally unsound and incapable of knowing the nature and consequences of his acts. Therefore, it is submitted that there was insufficient appreciation of the facts by the trial judge which warrant appellate intervention.

THE RESPONDENT'S SUBMISSION

[24] It is trite law that the defence of insanity under s 84 of the Penal Code is concerned with the appellant's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time.

[25] It was submitted that at the time of the murder incident, the appellant knew what he was doing and he knew what he was doing was right or wrong based on the testimony of DW2 that:

(a) the appellant, though suffering from delusional disorder but when committing the offence he was in the state of sound mind as he was aware of the nature of his act that what he was doing was wrong and punishable by law; and

(b) DW2, when asked by the court about the appellant's mental state of mind while committing the offence, firmly answered that the appellant was of sound mind at the time of the commission of the offence.

[26] DW2 was a defence witness and the appellant is bound by the evidence of its own witness. In *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14, Gopal Sri Ram JCA said:

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case.

[27] The learned trial judge found that the appellant's defence of insanity is unconvincing.

[28] It was submitted that the learned trial judge had considered the whole evidence objectively from all angles and had derived at a correct finding of guilt against the appellant.

A OUR DECISION

[29] Having perused the appeal records, we disagree with the appellant's submission. We find the learned trial judge had applied the correct test of legal insanity as opposed to medical insanity. This is what His Lordship states at para [39] of the written judgment:

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> [39] The Court of Appeal in the case of *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 drew a clear distinction between medical insanity and legal insanity in the following passage:
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> > 13. Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.
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> There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only
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> legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 of the Penal Code is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down
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> in s 84 of the Penal Code as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crime* (25th Ed) at p 280.

[30] Based on the principle of stare decisis, we also find the learned trial judge had adopted the correct approach as recommended by the Court of

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Appeal in *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 case in resolving the issue of insanity. The recommended approach is stated as follows:

> When the defence of insanity is raised the court needs to consider two matters, namely:
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> > (a) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind; and
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> > (b) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie that the accused was incapable of knowing the nature of his act as being wrong or
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> against the law.

[31] In the present case, the appellant admitted he killed the three victims. He agreed he knew killing people is wrong in law. He killed these people out of anger. The learned trial judge described the appellant's act of causing the deaths

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as an act of retaliation against PW13's disapproval of her son going out with him to consume alcohol. Based on the appellant's own admission, it is clear that he was aware that he killed people and he knew what he was doing is wrong in law. Therefore, he cannot claim he was insane at the time of the commission of the offence in the sense required under s 84 of the Penal Code.

[32] Further evidence which do not support the appellant's defence of insanity comes from his own expert witness, DW2. Paragraph 10.21 of DW2's expert report (exh D2), states as follows:

> 10.2.1 Mr Ulin is suffering from delusional disorder. Delusional disorder is a psychotic disorder characterised by beliefs that are held with strong conviction despite evidence disproving it. Despite the more common presentation is predominantly delusion, mood symptoms and perceptual disturbances like auditory and visual hallucination can occur during the course of illness. During the index offense, even though he was suffering from the mental illness, he was in the state of sound mind as he was aware of the nature of his act that what he was doing was wrong and punishable by law.

[33] In his oral testimony before the court, DW2 reiterated his finding that the appellant was of sound mind at the time of the commission of the offence.

[34] Whilst ultimately, it is the court that decide on whether the defence of insanity has been successfully raised, the court have to give due weight to the expert evidence of the psychiatrist (DW2). DW2, in his expert report and oral testimony formed a conclusion that the appellant was aware of the nature of his acts that what he was doing was wrong and punishable by law. In the absence of any evidence to the contrary by the appellant's expert witness, we find there is no appealable error and the learned High Court judge had not erred in fact and in law in convicting and sentencing the appellant. Our view is the conviction is safe. For these reasons, we find there is no merit in the appeal. The appeal is therefore dismissed. The conviction and sentence of the High Court are affirmed.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh